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No. 88-1595

In The
Supreme Court of the United States
October Term, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Petitioners,

v.

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.), AND BARBARA K. CLISBY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED BY PETITIONERS

Should this Court review an award of postjudgment interest in an antitrust case filed in 1974:

1. Where, the Court of Appeals awarded interest based on the unique facts of this case (including a 15-year history of litigation in which this Court has twice denied defendant-petitioners' petitions for certiorari) and petitioners' intentional predatory conduct, which destroyed Plaintiffs' small family business, and has been condemned by repeated findings of two juries in verdicts affirmed by the District Court and the Court of Appeals.

2. Where, because of the passage of time and paucity of cases, the Court of Appeals' decision will have no measurable precedential impact, since the only cases that might be affected are those where an initial judgment was secured before 10/1/82, and where, because of one or more appeals, no final decision by a court of appeals established a vested right to receive interest until after that date.

3. Where, because of remand by the court below to the District Court for calculation of the proper amount of postjudgment interest, the decision of the Court of Appeals is interlocutory and not a "final" decision.

4. Where the illusion of a division among the circuits, as contended, has been created by petitioners' inappropriate and misleading advocacy improperly linking two or more categories of cases together, and that illusion disappears when each case is correctly analyzed on its facts.

5. And where, the Court of Appeals:

(a) held that the Respondents (plaintiffs in the antitrust case) were entitled, based in part on the equities

and unique history of the case, to a larger amount of post-judgment interest than the District Court had awarded, but still denied Respondents the full amount of postjudgment interest requested;

(b) held that the legal theory espoused by petitioners was without legal support, had been previously rejected by the Court of Appeals in other cases, and in fact has been rejected by every other Court of Appeals ruling on the issue;

(c) applied the "manifest injustice" analysis from *Bradley v. School Board of Richmond,* 416 U.S. 696 (1974), pursuant to the request and brief of petitioners, who now are contending, contrary to their position in the Court of Appeals, that the "manifest injustice" analysis does *not* apply; and

(d) applied this Court's unanimous ruling in *Bradley* in a manner consistent with rulings of the Second, Third, Fifth, Sixth, Eighth and Ninth Circuits, using the "manifest injustice" analysis which has been approved by each of these Circuits and has not been disapproved by any Circuit.

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Pursuant to Supreme Court Rule 28.1, Respondents Joseph Bonjorno, Lorraine Kerr and Barbara Clisby state that they have no corporate affiliation other than formerly being owners and/or officers of the Columbia Metal Culvert Company, which ceased operations in 1977 due to the predatory activity of the Petitioners that is the subject of this lawsuit.

Following the death of George M. Kerr, Jr., Respondents petitioned the Court of Appeals to substitute Lorraine Kerr, Executrix of the Will of George M. Kerr, Jr., as a party. That petition was granted on March 29, 1989.

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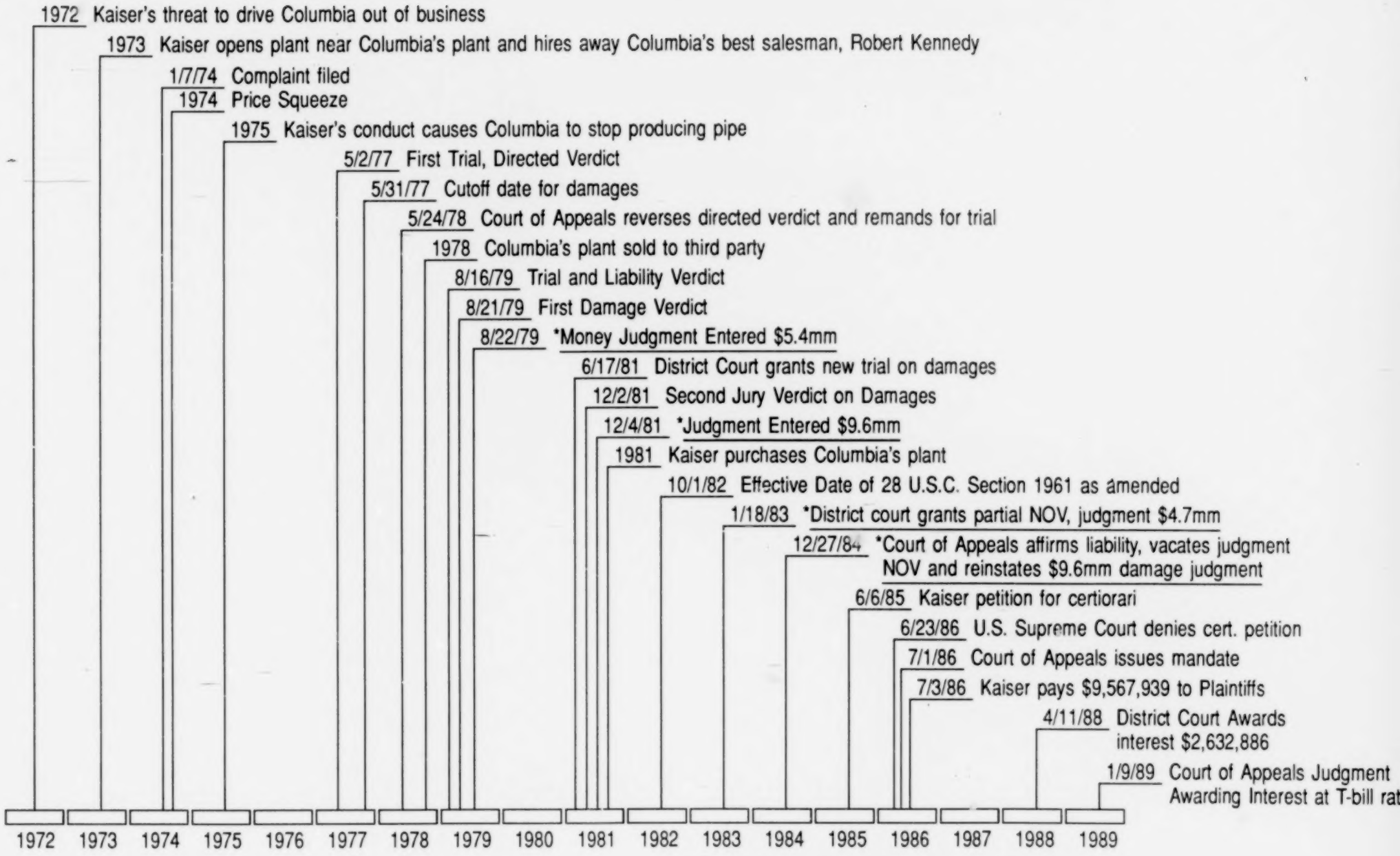
R.L. Stern, E. Gressman, S.M. Shapiro, *Supreme Court Practice* (BNA 6th ed. 1986) 15

S. Rep. No. 275, 97th Congress, 2d Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21 19

Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465 (1953) 15

BONJORNO TIME LINE


1972 Kaiser's threat to drive Columbia out of business
1973 Kaiser opens plant near Columbia's plant and hires away Columbia's best salesman, Robert Kennedy
1/7/74 Complaint filed
1974 Price Squeeze
1975 Kaiser's conduct causes Columbia to stop producing pipe
5/2/77 First Trial, Directed Verdict
5/31/77 Cutoff date for damages
5/24/78 Court of Appeals reverses directed verdict and remands for trial
1978 Columbia's plant sold to third party
8/16/79 Trial and Liability Verdict
8/21/79 First Damage Verdict
8/22/79 *Money Judgment Entered $5.4mm
6/17/81 District Court grants new trial on damages
12/2/81 Second Jury Verdict on Damages
12/4/81 *Judgment Entered $9.6mm
1981 Kaiser purchases Columbia's plant
10/1/82 Effective Date of 28 U.S.C. Section 1961 as amended
1/18/83 *District court grants partial NOV, judgment $4.7mm
12/27/84 *Court of Appeals affirms liability, vacates judgment NOV and reinstates $9.6mm damage judgment
6/6/85 Kaiser petition for certiorari
6/23/86 U.S. Supreme Court denies cert. petition
7/1/86 Court of Appeals issues mandate
7/3/86 Kaiser pays $9,567,939 to Plaintiffs
4/11/88 District Court Awards interest $2,632,886
1/9/89 Court of Appeals Judgment Awarding Interest at T-bill rat
1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989

*denotes the various "judgments" entered in this case

OPINIONS BELOW

This case had its genesis in an antitrust Complaint filed in January 1974 to recover treble damages for predatory acts by a giant monopolist, beginning more than 15 years ago, which ultimately destroyed Plaintiffs' small family business, resulting in a 1981 judgment of approximately $9.5 million.[1]

The Judgment and Opinion of the Court of Appeals of January 9, 1989 (which awarded to Plaintiffs' federally prescribed interest), reported at 865 F.2d 566, are reproduced in Petitioner's Appendix (Pet. A-) at A-1 and A-3, respectively. The Opinion of the United States District Court for the Eastern District of Pennsylvania is reproduced at Pet. A-31.

The Opinion of the Court of Appeals on the merits of the antitrust claim, dated December 27, 1984, is reported at 752 F.2d 802 (*cert. denied*, 477 U.S. 908 (1986)), and the Opinions of the District Court on the merits are reported at 518 F. Supp. 102 (1981) and 559 F. Supp. 922 (1983).

The Opinion of the Court of Appeals in a earlier appeal decided on May 24, 1978, is reported at 579 F.2d 20 (*cert. denied*, 439 U.S. 876 (1978)).

JURISDICTION

The judgment of the Court of Appeals on postjudgment interest was entered on January 9, 1989. Cross-petitions for rehearing and rehearing *in banc* were denied by Order dated February 13, 1989. Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical

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[1] Attached in the Appendix to Respondents' Cross-Petition which is being filed at the same time as this Brief (Cross-Pet. A-) A-1, and reproduced for the convenience of the Court on the opposite page, is a document entitled "Bonjorno Time Line," which succinctly identifies the principal opinions and events in the extraordinary history of this complex and protracted case.

Sales, Inc. ("Kaiser") filed and served its Petition for a Writ of Certiorari on March 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Respondents Joseph Bonjorno, Lorraine Kerr, and Barbara Clisby ("Plaintiffs") submit that although this Court has jurisdiction, this Court should not grant certiorari because a major issue remains to be resolved before the District Court, as to the applicable rate of interest in the present case. The Court of Appeals, by Order dated February 21, 1989 (Pet. A-74), directed that the District Court consider that issue in the first instance. See Pet. at 22-23 n.9, and discussion below at 11-12.

—o—

STATUTES INVOLVED

The interest award in this case involves interpretation of 28 U.S.C. § 1961, as amended effective October 1, 1982, which provides in pertinent part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such Court is held, execution may be levied for interest on judgments recovered in the Courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
>
> (b) Interest shall be computed daily to the date of payment . . . and shall be compounded annually.

This case also involves application of the second sentence of Federal Rule of Appellate Procedure 37, titled

"Interest on Judgments." The Rule in its entirety provides:

> Unless otherwise provided by law, if a judgment for a money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the District Court. If the judgment is modified or reversed with a direction that a judgment for money be entered in the District Court, the mandate shall contain instructions with respect to allowance of interest.

I. PRELIMINARY STATEMENT

The real issue presented in this dispute over interest is an attempt by a predatory monopolist to reap the benefits of its monopoly *and* retain the benefits of 10 years worth of interest (which benefit it obtained by delayed payment on a multimillion-dollar judgment); while, at the same time, denying to the innocent and injured Plaintiffs an award of interest equal to the benefits Kaiser received—an award which is required to fully preserve their judgment against diminution due to loss of the time value of money.

Kaiser seeks this unconscionable result by contending that Plaintiffs' interest should only accrue under a law repealed over six years ago at 6% simple interest, with no compounding, over a time period when interest rates in the private market peaked at prime rates over 20%. During this same period, Plaintiffs, due to Kaiser's conduct, were forced to borrow money at three percentage points *above* the prime rate.

Petitioners, in urging this court to grant certiorari, have attempted to create, in two respects, the illusion of conflicts among the circuits, that as we demonstrate below in this brief do not exist:

First, as we point out in Section III(8) pp. 24-26, Petitioners have lumped together in their "retroactive analysis", (Pet. at 14-22) two distinct classes of cases (1) statutory changes affecting vested substantive property rights vs. (2) remedial or procedural changes affecting rights

still in limbo. When these cases are restored to the categories where they belong, there is no conflict.

Second: In their discussion of this Court's "manifest injustice" analysis (*Bradley v. School Board of Richmond*, 416 U.S. 696 (1974)), Petitioners fail to recognize that because of the very nature of such factual analysis, each case may be decided differently because the facts are different. (See discussion below in III(5) pp. 17-19)

The Federal Interest Statute

More than six years ago, in 1982, Congress amended the federal interest statute, 28 U.S.C. § 1961, (which provided for interest on federal district court judgments to be awarded under state law) specifically to prevent the inequity that Kaiser requests this Court to perpetuate. (*I.e.*, awarding interest for federal antitrust violations under Pennsylvania law at 6% simple interest).

Public Policy Requires Adequate Interest

Because Kaiser's intentional predatory conduct in destroying Plaintiffs' family business is the most egregious and reprehensible type of conduct prohibited by the antitrust laws, public policy requires that adequate interest be awarded to prevent Kaiser from diminishing the treble damage award against it by profiting from its delay in payment. By arguing for an inadequate rate of post-judgment interest, Kaiser seeks to turn a profit out of its reprehensible conduct by paying the entire treble damage judgment ($9.5 million) out of the benefits (some $17 million) it gained from use of Plaintiffs' money.

Here, the delays in payment were occasioned by Kaiser's numerous post-trial motions and appeals which it ultimately lost. Kaiser's inequitable contentions are advanced, notwithstanding the condemnation of Kaiser's conduct by the jury and the Courts.

Non-recurring Issue & No Fundamental Unfairness

The issues presented by Kaiser are unique. Contrary to Kaiser's flawed analysis (see Pet. at 13), they are in

fact nonrecurring. They do not concern any ongoing issues of judicial administration. (See Section III(3) below pp. 13-15). Kaiser cannot, and has not attempted to point to any fundamental unfairness in the decision of the Court of Appeals: a decision which merely gave proper effect to the intent of Congress to override inadequate state law rates of interest such as Pennsylvania's 6% rate which is the lowest in the nation.[2] Kaiser has stubbornly litigated and relitigated every conceivable issue in this case and continues to delay full payment of its liability through further litigation. Kaiser should expect to pay a reasonable rate of interest over this period of delay.

Bradley v. School Board of Richmond *Controls*

The Court of Appeals reached the proper result on the applicable law under its careful analysis of the "manifest injustice" factors set forth by Mr. Justice Blackmun for a unanimous Court (with two abstentions)in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974). Although Kaiser contended below that *Bradley* provided the proper framework for analyzing the issues, it now attempts to disavow that position to this Court (see Section III(2)(a) below pp. 12-13). The circuits are uniformly in agreement on the applicability of the *Bradley* manifest injustice analysis in the handful of similar cases interpreting the applicability of amended 28 U.S.C. § 1961 to pending cases.

No Division Among Circuits On Equity Of Statute And Discretion To Set Date For Commencement Of Interest

This Court denied certiorari last term in *Chattem, Inc. v. Bailey*, 108 S. Ct. 2831 (1988) (with Mr. Justice White dissenting). Analysis of recent cases demonstrates there is no division among the circuits on this issue. *See e.g., Smith v. National Railroad Passenger Corp.*, 856 F.2d 467 (2d Cir. 1988). (See also Section III(9) below pp. 27-

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[2] Comment, *The Postjudgment Interest Rate In Pennsylvania: Ignoring Reality For Too Long*, 23 DUQ. L. REV. 1083 (1985).

29). The district court and the Court of Appeals (which was unanimous on this issue) did not exceed their authority in determining that interest should begin to run as of at least December 2, 1981—the date of the verdict recalculating damages. Indeed, as we demonstrate in Plaintiffs' Cross-Petition for Certiorari filed concurrently with this Brief, they erred by unduly *shortening* the time period over which interest should run by some two and one-half years.

Plaintiffs' Conditional Cross-Petition

Plaintiffs in their Cross-Petition request that if this Court grants certiorari (which Plaintiffs vigorously oppose) this Court should reaffirm the power of the federal Courts of Appeals to fashion equitable remedies, to do justice between the parties and provide for payment of interest (under Fed. R. App. P. 37 and 28 U.S.C. § 1912) at full market rates in exceptional cases such as the present one;—rather than award Treasury bill rates, as authorized by 28 U.S.C. § 1961, as amended, which are typically two to three points below prime and thus do not adequately preserve the value of the judgment against diminution due to loss of the time value of money.

The reasons why Plaintiffs conditionally seek certiorari are summarized below:

¶ Kaiser (which the jury found to have intentionally and willfully monopolized the market for fabricated aluminum culvert pipe) engaged in systematic predatory conduct which destroyed Plaintiffs' family business.

¶ By delaying its ultimate day of reckoning in having to pay its full liability on the judgment, Kaiser, the predatory monopolist, has reaped the benefits of delay, according to market rates, in an amount in excess of $17 million.

¶ Similarly, during this same period, the Plaintiffs (who were not awarded any prejudgment interest and whose damages were measured in 1977 dollars) were deprived of the full value of the

benefit of their judgment of liability from August 1979 to date by a similar amount—i.e., in excess of $17 million.

¶ The Court should not allow the foregoing inequity go unremedied.

Respondents' (Plaintiffs') Willingness To Accept Court Of Appeals Decision

Notwithstanding their desire to see full justice done, and to carry out the policy of the federal antitrust laws, the Plaintiffs, after more than 15 years of hard-fought litigation and great expense wish to put to an end this seemingly endless dispute so they can receive *now*[3] the interest awarded them below, and get on with their businesses and their lives. Thus Plaintiffs are willing to accept the Court of Appeals' decision if they can promptly and without further litigation and delay, partially enjoy the benefits to which a jury of their peers determined they were entitled—albeit their award of interest is significantly reduced, both as to time period and the total amount of interest awarded.

This Is a Fact-Bound Case Controlled by Bradley

Finally, although several Courts of Appeals have considered issues similar to those presented in the present case, and have reached varying results on the facts of those cases, there is no substantial conflict among the circuits.

All of the Courts of Appeals that have considered the issues, have analyzed them under the factors set forth by this Court in *Bradley v. School Board of Richmond,* 416 U.S. 696 (1974). (See Section III(4) below pp. 16-17).

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[3] Kaiser is now disputing Plaintiffs' contention as to the proper date of the treasury bill auction that fixes the proper rate of interest. Pet. at 22-23 n.9. As noted at pp. 11-12 of this Brief, this issue has been remanded by the Court of Appeals for decision by the District Court.

Thus, Kaiser could still appeal the final judgment of the District Court to the Court of Appeals and seek certiorari from this Court, thereby further delaying for two or more years Plaintiffs' ultimate recovery of interest.

Bradley sets forth a three-pronged test for determining *manifest injustice* which depends upon the facts of the specific case and the nature of the parties and their rights. The differing results that have been reached by different Courts of Appeals are based upon the differing facts presented to them. Plaintiffs, however, submit that no Court of Appeals would reach a different result than that reached by the Third Circuit on the issue of the applicable law, given the circumstances presented in this case, including:

(1) the vesting of Plaintiffs' right to receive interest after the effective date of the 1982 amendment to the statute;

(2) the wholly inadequate 6% simple interest rate provided under Pennsylvania state law as compared with market interest rates peaking over 20% and the intent of Congress to override such inadequate rates of interest;

(3) Plaintiffs' repeated requests to obtain prompt payment of the judgment including mandamus petitions requesting the Court of Appeals to speed up the decision of the District Court on post-trial motions and requests for lifting the stay of issuance of the mandate to force payment of the judgment; and

(4) finally, but most important, Kaiser's intentional predatory monopolistic conduct and calculated destruction of Plaintiffs' small family business.

For the reasons developed more fully below, Plaintiffs respectfully request that this Court deny Kaiser's Petition for Certiorari.

II. COUNTERSTATEMENT OF THE CASE

A. Kaiser's Predatory Destruction of Plaintiffs' Business And Monopolization Of The Market For Fabricated Aluminum Culvert Pipe

On the merits of the underlying dispute, Kaiser, a large international corporation, was found liable for deliberately destroying Columbia Metal Culvert Co., Inc., Plaintiffs' relatively small competing business. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986); *see also Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 31 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978).

For a more complete counterstatement of the case, see the statement in Plaintiffs' Cross-Petition, which is incorporated here in its entirety by reference.

B. Kaiser Has Obtained The Benefits Of Delay, And The Value Of Plaintiffs' Judgment Has Been Severely Diminished Due To Loss Of The Time Value Of Money

Plaintiffs' antitrust damages were measured as of May 31, 1977. Interest on $9,567,939 from August 1979 through June 13, 1988 (when Plaintiffs' brief was filed with the Court of Appeals) after accounting for Kaiser's payment of $9,567,939 as of July 3, 1986 is in excess of $17 million, when measured at monthly average prime rates, compounded monthly. Interest continues to accrue at a rate of approximately $4,250 per day. Kaiser, as a predatory monopolist, should not be permitted to retain, at Plaintiffs' expense, the windfall benefits it received by delaying payment of the judgment. Awarding Plaintiffs Treasury bill interest under 28 U.S.C. § 1961 as amended, as directed by the Court below, will help diminish Kaiser's windfall, and will also help preserve for Plaintiffs—although not fully—the jury's award.

C. The Judgment Of The Court Of Appeals

In determining the appropriate interest on Plaintiffs' judgment on the merits, the Court of Appeals:

(1) rejected Kaiser's contention that interest should only run from the date of issuance of the Court of Appeals mandate on July 1, 1986, (which reinstated the jury's December 2, 1981 damage award);

(2) rejected, without comment, Kaiser's contention that postjudgment interest should accrue only on pre-trebled damages, rather than the amount of the judgment;

(3) denied Plaintiffs' request that interest be calculated at monthly average prime rates, compounded monthly, from August 1979, (which would have resulted in an award of interest in excess of $17 million);

(4) denied Plaintiffs' request that interest should date back to August 1979, when the original verdicts and judgment were entered, and instead held that interest should begin to run as of December 2, 1981, the date of the verdict on the retrial on damages;

(5) held that, on the narrow facts of this case, application of current law, which has now been in effect for over six years, does not result in manifest injustice, and therefore the amount of interest due and owing to the Plaintiffs is determined by the current version of 28 U.S.C. § 1961 (federal T-bill rate), rather than the version repealed by Congress in 1982 (state law rates).

The Court of Appeals carefully examined Kaiser's contention, based upon Kaiser's reliance on the applicability of the rule set forth in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), that the application of current law would result in manifest injustice.[4] In analyzing the factors set forth in *Bradley*, the Court of Appeals correctly concluded, based on the special facts of this case,

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[4] Kaiser sought to apply the repealed version of 28 U.S.C. § 1961, in an attempt to obtain an unrealistic rate of postjudgment interest of 6%, also contending contrary to 28 U.S.C. § 1961(b) that there should be no compounding of interest. In 1982, Congress amended 28 U.S.C. § 1961, specifically to prevent the type of result Kaiser contends should be reached in the present case: long delay, and serious diminution in the value of a judgment due to loss in the time value of money, based on inadequate state law rates of interest.

that application of current law would not result in manifest injustice:

> In view of the nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in the law on their rights, we conclude that application of the T-bill rate to the entire period does not result in manifest injustice.

865 F.2d at 576, Pet. A-23.

As discussed below, the Court of Appeals conclusion of no manifest injustice was fair and just as between the parties, and consistent with longstanding precedent in this Court, as well as precedent in other Courts of Appeals. There is no reason to grant certiorari in this case.

III. REASONS FOR DENYING KAISER'S PETITION

1. The Court Should Not Grant Kaiser's Petition Because No Final Judgment Has Been Entered On Plaintiffs' Interest Award

Although this Court has jurisdiction to review interlocutory judgments of federal courts of appeals, the Court has properly established a general rule of refraining from issuing a writ of certiorari where a judgment is not final. As Kaiser notes in its Petition at 22-23, n.9, the Court of Appeals has remanded a major issue to the district court to determine before the amount of interest due can be calculated.

Accordingly, the judgment of the Court of Appeals is not a final judgment, and the Court should not issue a writ of certiorari to review that interlocutory judgment.[5]

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[5] In *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916), this Court stated:

> except in extraordinary cases, the writ is not issued until final decree [citations omitted]. The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application.

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Since Kaiser's Petition for certiorari is premature, it should be denied.

2. Kaiser Failed To Raise The Arguments Presented On Its Petition Before The Court Of Appeals. It Is Thus Barred From Presenting Those Arguments Now

a. Kaiser Is Precluded From Arguing Against The Applicability Of *Bradley* By Its Reliance On *Bradley* In The Court Below

Kaiser's principal argument below was that "the District Court *correctly* applied . . . *Bradley v. School Board*, 416 U.S. 696 (1974)." (Kaiser's Appellate Brief at 22 (emphasis added)). Yet Kaiser contended for the first time in its petition for rehearing in the Third Circuit, and now contends before this Court, that the analysis set forth in *Bradley* does *not* apply to this case. Pet. at 14.

Kaiser's new argument is foreclosed by its failure to raise those contentions below.[6] Moreover, Kaiser's sudden change of position on the applicability of *Bradley* in the face of the careful and correct analysis of the *Bradley* factors by the Court of Appeals vividly demonstrates the lack of any logical consistency in the positions advocated by Kaiser.[7] Kaiser has argued all along that *Bradley* pro-

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In *Brotherhood of Locomotive Firemen & Engineermen v. Bangor & Aroostook R. Co.*, 389 U.S. 327 (1967), this Court vacated an order granting certiorari in a case in which the Court of Appeals had ruled on some legal issues, but remanded the case to the District Court to consider a significant remaining issue. This Court concluded that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Id.* at 328.

6 *See Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (issue first raised in response to motion for reconsideration in Court of Appeals was precluded from consideration by this Court); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

7 Kaiser contends that interest should not begin to run until July 1, 1986 (nearly four years after the effective date of

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vides the proper framework for decision, and it is bound by those arguments.

b. Kaiser Is Precluded From Arguing Against The Running Of Interest From The Date Of The Verdict By Its Failure To Raise This Issue Below

Kaiser again reverses its field when it now argues to this Court, contrary to its brief below,[8] that the proper date to start the running of interest was December 4, 1981, the date the District Court entered a judgment on the jury verdict.[9]

3. Kaiser's "Flood-Gate" Argument Regarding The Number Of Outstanding Judgments That Could Be Affected If This Court Does Not Reverse The Decision Below Is Utterly Unfounded And Wrong.—To The Contrary, Review By This Court Will Have No Measurable Impact Because There Are Few, If Any, Pre-October 1, 1982 Judgments Still In The Appeals Pipeline

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the amendment), yet at the same time it contends that interest should run at a rate provided by the version of 28 U.S.C. § 1961 repealed in 1982. (Pennsylvania's 6% simple rate). There is no way to reconcile these positions.

Kaiser also contended below that the two days of interest it believed were appropriate should be calculated under the *amended* statute at T-bill rates, thus *admitting* the applicability of current law to the interest due on the Court of Appeals' judgment.

8 Kaiser argued to the Court of Appeals that interest should run either from July 1, 1986, the date the judgment became final following Kaiser's appeals, or from December 2, 1981, the date the jury verdict was rendered. 865 F.2d at 570, Pet. A-11.

9 Kaiser's only motivation for its belated challenge of these two days of interest is an attempt to lock in to a lower T-bill rate and deny Plaintiffs approximately one-third of their interest (some $4 million).

The Court of Appeals has remanded the issue of the proper T-bill rate to the District Court and that issue is not ripe for this Court. See Kaiser Pet. at 22-23 n.9.

Kaiser's Certiorari Petition misleadingly warns of widespread and dire consequences resulting from the decision of the Court of Appeals unless reversed by this Court. However, its data is wrong and its conclusions are completely unfounded.

Kaiser wrongly claims that there are thousands of judgments, worth hundreds of millions of dollars, that will be affected by the Court of Appeals' narrow holding. Pet. at 13. Kaiser suggests that judgment creditors for any judgment predating October 1, 1982 that is still listed as unsatisfied in records of the Clerk of the Eastern District of Pennsylvania could come back to Court and demand interest based on the T-bill rates from the time of judgment. That contention is meritless and founded on Kaiser's desperate search for a much broader class of cases than covered by the decision below.

Kaiser would include in its count all cases in which the judgment has not yet been collected or reported to the District Court as satisfied. But, as this Court made clear in *Bradley*, its analysis applies *only* to cases *currently pending before the courts*, 416 U.S. at 711. Thus, the only cases that could be affected by the opinion of the Court of Appeals in this case are cases within the Third Circuit in which (1) a money judgment was entered prior to October 1, 1982 (the effective date of the amendment), and (2) the case is still pending on direct review.[10] That category of cases potentially affected by this case is infinitesimal and is quickly disappearing.[11] Indeed, it is doubtful that there are or will be any pre-October 1, 1982 cases, other than this case, still pending at all in the Third Circuit by the time this Court could render any opinion on this issue.

There have been a handful of cases interpreting the application of amended § 1961 to cases pending as of its October 1, 1982 effective date. Now that almost seven years have elapsed since the effective date of the amendment, this issue has already been resolved for most if not all other cases pending in 1982 in which a judgment had been entered prior to October 1, 1982. There is no reason to grant certiorari in the present case, which may very well be the last case still pending.[12]

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10 See *Campbell v. United States*, 809 F.2d 563, 569 (9th Cir. 1987).

11 Plaintiffs' counsel's review of cases predating October 1, 1982 that are still listed as "open" by District Court records reveals only five cases in the Eastern District of Pennsylvania still "open" in which a money judgment was entered prior to the amendment to section 1961. A review of the dockets of these five cases suggests that there are no open issues and that they have been reduced to final controlling judgments or settled.

Moreover, there are a host of errors in Kaiser's data:

(1) The list from which Kaiser derived its statistics, is *not* a list of open cases, but rather is a list of judgment debtors, and it contains many duplicative entries.

(2) Judgments entered against more than one defendant are listed separately for each defendant. (For example, business name and owner's name, multiple separate businesses, parent and subsidiary business' names).

(3) Judgment liens that are revived are listed as separate judgments.

(4) Finally inevitable errors and duplication exist in the list.

None of these factors can be accurately assessed unless the list of judgment debtors is generated by docket number, however, the judgment debtor list is only available from the District Court Clerk's Office in alphabetical order of judgment debtors.

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12 *Cf.* Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108 (1959); R.L. Stern, E. Gressman, S.M. Shapiro, *Supreme Court Practice*, § 4.4 at 200 ("If the statute upon which the controversy rests has expired or been amended in a manner which will prevent the problem from arising in the future, certiorari may be denied . . . .") (BNA 6th Ed. 1986); Stern, *Denial*

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4. The Circuits Are In Agreement That *Bradley's* Manifest Injustice Analysis Governs The Application Of Amended 28 U.S.C. § 1961 To Pending Cases

Contrary to Kaiser's suggestion of any conflict or confusion, all of the Circuit Courts that have analyzed the applicability of the amendment to § 1961 to pending cases have utilized the *Bradley* manifest injustice analysis.[13] Accordingly, there is no conflict whatsoever as to the proper framework for determining whether amended 28 U.S.C. § 1961 should apply in pending cases.

In *Bradley v. School Board of Richmond,* 416 U.S. 696 (1974), a unanimous[14] Court, per Mr. Justice Blackmun, reiterated the principle that for cases pending on direct review, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manfiest injustice or there is statutory direction or leg-

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of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465 (1953) (where a conflict among courts is eliminated by amending the statute, there is no reason to grant certiorari to resolve the conflict).

13 *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 865 F.2d 566, 572-76 (3d Cir. 1989); *Bailey v. Chattem, Inc.*, 838 F.2d 149, 155 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988); *Campbell v. United States*, 809 F.2d 563, 569-76 (9th Cir. 1987); *Brooks v. United States*, 757 F.2d 734, 741-43 (5th Cir. 1985); *Litton Systems, Inc. v. AT&T*, 746 F.2d 168, 172-76 (2d Cir. 1984). In addition, *R.W.T. v. Dalton*, 712 F.2d 1225, 1234-35 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983), cites the discussion in *The Schooner Peggy* of the "manifest injustice" factors.

Two other Courts of Appeals have referred to the issue in dicta or considered the issue in a per curiam opinion without any analysis, and have not specifically referred to *Bradley* or *The Schooner Peggy*. *Merit Insurance Co. v. Leatherby Insurance Co.*, 728 F.2d 943, 944 (7th Cir. 1984) (per curiam); *United States v. Dollar Rent-A-Car Systems, Inc.*, 712 F.2d 938, 940 n.5 (4th Cir. 1983) (dicta in footnote).

14 Justices Marshall and Powell took no part in the consideration of the case.

islative history to the contrary." 416 U.S. at 711. Mr. Justice Blackmun went on to identify, as the focus of the analysis of whether there is manifest injustice:

> (a) the nature and identity of the parties;
>
> (b) the nature of their rights; and
>
> (c) the nature of the impact of the change in law upon those rights.

Id. at 717 (citing *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801)).

5. Fact Bound Issues: Any Differences In Result In Applying Amended § 1961 To Pending Cases Is Due To The Different Facts In Each Case Analyzed For Manifest Injustice

Kaiser wrongly argues in its Petition that the decision of the Court of Appeals "directly conflicts" with *Litton Systems, Inc. v. AT& T,* 746 F.2d 168 (2d Cir. 1984); *Brooks v. United States,* 757 F.2d 734 (5th Cir. 1985); *Merit Insurance Co. v. Leatherby Insurance Co.,* 728 F.2d 943 (7th Cir. 1984) (per curiam); and *United States v. Dollar Rent-A-Car,* 712 F.2d 938 (4th Cir. 1983) (dicta).[15] Pet. at 9. However, Kaiser's argument ignores the fact-based nature of the *Bradley* manifest injustice analysis.

The illusory "conflict" among circuits is nothing more than a good example of how the discretionary "manifest injustice" analysis properly gives the Courts flexibility in determining this issue on the facts and equities of the individual cases presented. The *Bradley* analysis is intended to examine the specific facts of each case to deter-

15 *Dollar Rent-A-Car* presents only dicta and *Merit Insurance* did not give more than a one sentence analysis. Moreover, the Fifth Circuit rule of *Brooks* has been modified to provide that the amended version of § 1961 applies for interest running after any judgments subsequent to October 1, 1982 in a given case. *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613 (5th Cir. 1988), *Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111, 1113 (5th Cir. 1985). Therefore only *Litton* presents any real possibility of substantive conflict, and it is distinguishable on its facts.

mine if "manifest injustice" would result from applying the law in effect at the time a decision is rendered. Given the factual nature of the inquiry, and the goal of ensuring justice between the parties, varying *results* are hardly surprising under *Bradley*. Furthermore, the *results* from applying *Bradley* are limited in precedential value by the facts and equities of each case.

Kaiser, relying heavily on the Second Circuit's decision in *Litton v. AT&T*, attempts to create a conflict, and makes the incredible assertion that *Litton* and *Bonjorno* involve "virtually identical facts." Pet. at 10. Although both *Litton* and *Bonjorno* are private antitrust actions, the factual similarities end at that point:

The *Litton* case involved a vastly larger award of $276 million to which the parties *had stipulated* the applicable state interest rate of 9% thus justifying the defendants' reliance that its interest liability was fixed. 746 F.2d at 170. Constrast this with Kaiser's situation, in which Kaiser had no justification to rely on the fact that the inordinately low Pennsylvania 6% simple interest rate might not be changed at any minute.[16] Furthermore, Kaiser in the court below, did not offer a scintilla of evidence to show any reliance to its detriment or other prejudice.

Bonjorno, unlike *Litton*, involved no stipulation on interest rates. Plaintiffs in *Bonjorno*, unlike *Litton*, timely petitioned for inclusion of instructions in the Court of Appeals' mandate on interest. Moreover, *Bonjorno* involves vicious predatory conduct which is a classic treble damage case, in contrast to *Litton* which involved an attempted monopolization claim based on a tariff filed by defendant with the F.C.C.—conduct at least arguably protected by the *Noerr-Pennington* doctrine. *See Litton Systems, Inc.*

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[16] *See Campbell v. United States*, 809 F.2d 563, 575-76 & n.9 (9th Cir. 1987) (distinguishing *Litton* on basis of stipulation); *cf. Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1479-80 (3d Cir.), *cert. denied*, 109 S.Ct. 273 (1988) (defendant had no right to rely on 8% legal rate of interest as of 1975); *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985).

v. AT&T, 700 F.2d 785, 806-12 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

Almost ten years have elapsed since the entry of the original judgment in favor of Plaintiffs and the measurement of damages as of May 31, 1977. The failure to award adequate interest will severely diminish the value of Plaintiffs' judgment.[17] The 6% simple interest that would be applied under the old § 1961 would produce a grossly inadequate and inequitable result, rewarding the predatory monopolist for its delay in paying the judgment—and thereby encourage others to profit from stretching out litigation by multiple appeals.

Moreover, differing views on legislative history may also be case-specific.[18] For example, a federal court in Pennsylvania might view failure to apply current law as inconsistent with congressional intent to override Pennsylvania's inadequate 6% rate, while a Court in a state with a state postjudgment interest rate of 18% might view the situation in a different light.

6. The Third Circuit Reached The Correct Conclusion In Its Application Of *Bradley*.—Its Narrow Fact-Specific Holding Is Not Inconsistent With The Decision Of Any Other Circuit

Under *Bradley* current law should be applied to pending cases unless it would result in "manifest injustice" or there is "statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711. *See Bonjorno*, 865

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[17] Prevention of such diminution of the value of the damage award was precisely the reason for the amendment, *see* S. Rep. No. 275, 97th Congress, 2d Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21. This concern was specifically addressed by the Court of Appeals below. *See* 865 F.2d at 574.

[18] *Compare Campbell*, 809 F.2d at 566 (discussing purposes of the change in applicable interest rate), *with Litton*, 746 F.2d at 170, 174-75 (no discussion of purposes of 1982 amendment).

F.2d at 573; *Campbell,* 809 F.2d at 572; *Litton,* 746 F.2d at 174.

As a practical matter, it is clear that there is no "manifest injustice" in requiring an adjudicated antitrust predator to pay an interest rate that more adequately accounts for the time value of money. Moreover, the legislative history clearly establishes congressional intent to override inadequate state law rates of interest, precisely to prevent the inequitable result of inadequate interest for which Kaiser contends.[19] Moreover, comparison of this case to *Bradley* and analysis of the three-pronged test for "manifest injustice" in *Bradley* vividly demonstrate that the Court of Appeals reached the correct result.[20]

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[19] On the legislative history, the Court of Appeals correctly noted that there was very "scant indication" to bear on any of these issues. The Third Circuit in *Bonjorno* agreed for the most part with the analysis of the legislative history set forth by the Ninth Circuit in *Campbell v. United States,* 809 F.2d 563 (9th Cir. 1987).

Although the Second Circuit in *Litton Systems, Inc. v. AT&T* 746 F.2d 168 (2d Cir. 1984) reached a different interpretation of the legislative history, its analysis was result oriented, and the Court clearly reached the conclusion it believed was appropriate on the facts of the case presented to it which, as noted above, differ starkly from the facts of the present case. Given the scant legislative history, these result-oriented interpretations of the legislative history are not surprising. The one matter that is well established in the legislative history, however, is that Congress intended to override state law rates of interest that provided inadequate interest to carry out the policy behind the federal interest statute to preserve the value of the judgment against diminution due to loss of the time value of money. *See supra* note 17.

[20] Mr. Justice Blackmun in *Bradley,* writing for a unanimous court, cautioned that the question before the Court in *Bradley,* regarding the propriety of a fee award covering payment for services rendered prior to enactment of the statutory fee provision was "not simply one relating to the propriety of retroactive application of Section 718 to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation *where the propriety of a fee award was pending resolution* on appeal when the statute became law." 416 U.S. at 710

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The three elements of the *Bradley* manifest injustice analysis compel the result reached by the Court of Appeals in the present case:

Nature And Identity Of The Parties

The *first factor,* the nature and identity of the parties, is principally concerned with distinguishing purely private disputes from cases that implicate broader national concerns. *See Bradley,* 416 U.S. at 717 (citing *Schooner Peggy,* 5 U.S. (1 Cranch) at 110). In finding that national interests are implicated by awarding adequate interest to the Plaintiff, the Court of Appeals below correctly recognized Plaintiffs' role as private attorneys general, furthering public policy by making Kaiser accountable for its intentional predatory destruction of a small competitior to preserve its monopoly.[21] The Court of Appeals observed that "the congressional mandate that plaintiffs who prevail in [antitrust actions] be awarded treble damages should not be diminished by insufficient postjudgment interest." 865 F. 2d at 575.

Nature Of Their Rights

The *second manifest injustice factor* focuses on the nature of the parties' rights involved in the case. This factor, according to *Bradley,* seeks to avoid the application of new law where it would deprive or infringe upon *vested* or unconditional rights. *Bradley,* 416 U.S. at 720. In this case, the Court of Appeals correctly noted that there is

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(emphasis added). *See* 865 F.2d at 573 n.14; Pet. A-17 n.15. Similarly, in the present case, the issue is not simply whether § 1961, as amended, applies to interest that runs over a period prior to the enactment of the amendment, but is a question of the applicability of amended § 1961 to a case pending resolution when the amendment became effective.

[21] *Bonjorno,* 865 F.2d at 575 (citing *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 634-35 (1985)); *cf. Bradley,* 416 U.S. at 719 (noting private attorney general concept in civil rights enforcement created public interest in attorney fee statute at issue) (quoting *Newman v. Piggy Park Enterprises, Inc.,* 390 U.S. 400, 401-02 (1968)).

no vested or unconditional right to any given rate of interest on a damage award that is not itself final. 865 F.2d at 575. This conclusion follows from well settled law that there is no vested right to receive any particular rate of postjudgment interest *even after* a final controlling judgment is entered. *See Morley v. Lake Shore & Michigan Southern R. Co.*, 146 U.S. 182 (1892), and other decisions of this Court discussed in Section 7, that follows.

Nature Of Impact Of Change In Law Upon Rights

Finally, *the third factor* in the analysis for manifest injustice considers the impact of the change in law upon the rights of the parties. The inquiry here is whether the change imposes new and unanticipated obligations that would have caused the party to change the conduct that led to the lawsuit. *Bradley*, 416 U.S. at 720. In *Bradley*, the Court noted that clarification of the right to a fee award had no bearing on the underlying violation of civil rights by defendants. 416 U.S. at 720-21 ("there was no change in the substantive obligations of the parties"). Similarly, refinements in the interest rate on judgments have no bearing on Kaiser's substantive violation of the antitrust law.[22] The Court of Appeals correctly recognized that a change in the rate of interest charged on judgments for trebled antitrust damages is neither a new nor an unforeseeable obligation. *Bonjorno*, 865 F.2d at 575-76.

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[22] The *Litton* court concluded that if the defendant had known of or anticipated the new interest rate it "might have" altered its conduct. 476 F.2d at 176. However, the *Bradley* court refused to speculate on such matters, stating that there was "no indication" of such possible changes in behavior. 416 U.S. at 721.

The ridiculous suggestion that Kaiser might not have destroyed Plaintiffs' business if it had known that it would have to pay a compensatory rate of interest for delay in payment of the judgment is understandably not raised by Kaiser. Moreover, Kaiser could have, but chose not to, stop the running of interest by paying the amount due into court. *Cf. Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985).

Thus, in considering the *Bradley* factors, the Court of Appeals reached the correct conclusion that there was no manifest injustice in the application of current law, because:

(1) The public policy of the antitrust laws and the private attorney general role of Plaintiffs in enforcing those laws implicates national concerns.

(2) Application of current law does not alter any vested property rights. As the Court of Appeals correctly held:

> Bonjorno's right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits. This did not occur until after the effective date of the amendments.

865 F.2d at 575, Pet. A-22.

(3) The imposition of a more nearly compensatory rate of interest did not impose any "new and unanticipated obligations" that might have altered Kaiser's conduct in intentionally destroying Plaintiffs' business.

Moreover, there is obviously no manifest injustice in carrying out the intent of Congress to override inadequate state law rates of interest such as Pennsylvania's 6% rate, particularly now—more than six years after the effective date of the amendment as declared by Congress. The Court of Appeals reached the correct result on the applicable law and therefore there is no reason to grant certiorari.

7. The Court Of Appeals Decision Is Completely Consistent With Longstanding Precedent Of This Court, Dating Back To The Nineteenth Century, That A Change In The Interest Rate On A Damage Award Does Not Affect Vested Rights

Almost 100 years ago, this Court specifically held that the owner of a judgment has no *vested* right to receive any particular rate of interest on a judgment, *even after that judgment has become a final controlling judgment after the expiration of all appeals. Morley v. Lake Shore &*

Michigan Southern R. Co., 146 U.S. 162, 168-69 (1892). *A fortiori*, Kaiser is foreclosed from contending that it is somehow prejudiced by a change in the interest rate mandated under the federal interest statute *prior* to the date of a final controlling, non-appealable judgment.

Similarly in *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163 (1933), dealing with prejudgment interest, this Court held that interest imposed by statute on damages for breach of contract can be applied to causes of action arising *before* the statute was enacted. *Id.* at 167-68. The Court stated that the statute "concerns the remedy and does not disturb the obligations of the contract." *Id.* at 167.[23]

8. Kaiser's Disingenuous Effort Of Confusing Two Classes Of Cases (Retroactive Legislation Altering Substantive Vested Property Rights Versus Remedial Or Procedural Changes Affecting Pending Litigation) To Create The Appearance Of A Conflict Among The Circuits That Does Not Exist, Should Be Rejected Out Of Hand

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[23] The Court in *Funkhouser* acknowledged that altering statutory rates of interest is within "the power of the State to provide remedies for enforcement and secure adequate redress in case of breach." *Id.* at 168 (citation omitted). That well-recognized legislature prerogative did not impair the parties' due process rights, and thus " 'to enact laws providing remedies for a violation of contracts' and 'to alter or enlarge those remedies from time to time' was within the competency of the legislature." *Id.* at 167 (quoting *Waggoner v. Flack*, 188 U.S. 595, 603 (1903)).

See also Sprang Industries v. Aetna Casualty & Surety Co., 512 F.2d 365, 371-72 (2d Cir. 1975) (no right to particular rate of interest on contract damages that would prohibit change in statutory interest before satisfaction of judgment); *Shook & Fletcher Insulation Co. v. Central Rigging & Contracting Corp.*, 684 F.2d 1383, 1388-89 (11th Cir. 1982) (where statutory rate of interest changed after judgment, party owing damages "has no vested right to a continued 7% rate of interest on judgments entered against it; the rate of interest is a creature of statute, not contract").

Kaiser, in attempting to create the illusion of conflict among the circuits, improperly lumps together two completely different classes of cases: *one* prohibiting retroactive application of statutes to defeat vested property rights and *the other* involving procedural or remedial changes that should be applied to pending cases absent manifest injustice.

This Court in *Bradley* perceptively recognized that difference:[24]

> This court in the past has recognized a distinction between the application of a change in law that takes place while a case is on direct review on the one hand and its effect on a final judgment under collateral attack on the other. *Linkletter v. Walker*, 381 U.S. 618, 627 (1965). We are concerned here only with direct review.

Id. at 710-11 (footnote omitted). As this Court made clear in *Bradley*, any confusion on this issue was resolved by *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), which held that "an appellate court must apply the law in effect at the time it renders its decision." *Id.* at 281 (quoted in *Bradley*, 416 U.S. at 714).

The Court of Appeals recognized this basic distinction, and thus found no conflict between the *Bradley* rule that applies to pending cases, and true retroactivity, where "application of the new law would affect rights or obligations existing prior to the change in law." 865 F.2d at 573. Other circuits addressing the application of the amended § 1961 to pending cases have also had no difficulty recognizing the difference. *See, e.g., Campbell v. United States*, 809 F.2d 563, 570-71 (9th Cir. 1987).

As the court below recognized, the line of cases referring to a presumption against retroactivity involved the distinguishable problem of true retroactive application

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[24] Blacks Law Dictionary defines retroactive laws as those which "take away or impair *vested* rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transaction or considerations already past." (emphasis added)

of law to defeat *vested property rights*.[25] Kaiser incorrectly cites these same cases as evideince of a "serious conflict." Pet. at 14-15.

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[25] *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), for example, involved the retroactive application of a section of the 1978 Bankruptcy Act to exclude household items from creditors liens already in existence. This Court invalidated the retroactive application of this statute because it impaired "antecedent rights" that were fully vested. *Id.* at 79.

Bowen v. Georgetown University Hospital, 109 S. Ct. 468 (1988), involved a 1984 regulation that changed the method for calculating reimbursement to hospitals providing Medicare treatment in 1981 and 1982. *Id.* at 470-71. The rights affected by this regulation had been vested and established prior to the promulgation of the regulation, a totally distinguishable situation from *Bonjorno*, where the final controlling judgment was not entered by the Court of Appeals until December 1984, two years after the effective date of the change in § 1961, and was not finalized until this Court's denial of certiorari in 1986. Moreover, in *Georgetown University*, the legislative history clearly "expressed a desire to forbid retroactive cost limit rules" according to the Court. *Id.* at 474. Yet even though the *Georgetown University* opinion does not even cite or refer to this Court's unanimous opinion in *Bradley*, Kaiser relies upon *Georgetown University* for the proposition that *Bradley* "is no longer viable." Pet. at 14.

In *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928) the Court considered the application of a 1924 change in the time period for which interest will be paid on tax overcharges. The Court held that the interest should be paid in accordance with the old interest provision, which was still in effect on the last day for which interest was payable, when the Commissioner approved the payment of the interest owing. *Id.* at 162 (citing *Girard Trust Co. v. United States*, 270 U.S. 163, 169 (1926) (interest is payable on tax overcharges only up to date Commissioner approves payment)).

See also Greene v. United States, 376 U.S. 149 (1964) (having previously won a declaration by Supreme Court that revocation of security clearance was invalid, plaintiff was entitled to compensation under regulation in force at the time of final declaration); *Shwab v. Doyle*, 258 U.S. 529 (1922) (1916 tax statute did not apply retroactively to transactions previously consummated); *Union Pacific Ry. v. Lara-*

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9. This Court's Denial Of Certiorari In *Chattem, Inc. v. Bailey*, And Subsequent Developments, Demonstrate That There Is No Division Among The Circuits On The Equity Of The Statute, Which Allows Interest To Date Back Earlier Than The Ultimate And Final Judgment

Kaiser's suggestion that it owes only two days interest (from the date of issuance of the Court of Appeals' mandate after denial of certiorari by this Court until it paid an amount equal to the principal amount of the judgment) is simply unconscionable. Kaiser contends that interest should run from July 1, 1986. Pet. at 24 n.10. Contrary to Kaiser's contentions, under longstanding authority, the "equity of the statute" allows interest to date back to a date earlier than entry of the judgment on remand. *See National Bank of Commerce of New York v. Mechanics National Bank*, 94 U.S. 437, 439 (1877) (noting the "equity of the statute").

Moreover, Kaiser's position is contradicted by Fed. R. App. P. 37, which mandates interest back to the original district court judgment in case of an affirmance, and grants the Court of Appeals discretion as to the allowance of interest in the event a judgment is modified or reversed. *See also* 28 U.S.C. § 1912.

This Court denied certiorari last Term on similar issues presented in *Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988) (with Mr. Justice White dissenting from denial of cert.). Since that denial of certiorari, at least one circuit has noted that the adoption of Fed. R. App. P. 37 effectively overruled any precedent that might have seemed to be in conflict with the

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mie Stock Yards Co., 231 U.S. 190 (1913) (Act of Congress retroactively affecting established property rights in railroad rights of way was invalid); *United States v. American Sugar Refining Co.*, 202 U.S. 563 (1906) (treaty with Cuba not intended to apply import duty to shipments made prior to ratification).

majority rule as expressed by the Third Circuit and other circuits. *See Smith v. National Railroad Passenger Corp.*, 856 F.2d 467 (2d Cir. 1988).

Contrary to Kaiser's suggestion of a conflict among the circuits, the circuits are generally in accord that the Court has discretion under the equity of the statute in establishing the date from which interest will run and it is the discretion granted to the Court and not any conflicting interpretation of the law that accounts for differences on the facts of specific cases as to when interest begins to run. The older cases in certain circuits adopting a narrow interpretation of § 1961 are no longer viable after the adoption of Fed. R. App. P. 37 in 1968, and presumably all of the Courts of Appeals will or already have come into line with the majority which includes the Third Circuit, as the Second Circuit has recently done.[26] This issue does not present a substantial conflict among the circuits warranting the attention of the Supreme Court.

Moreover, to the extent Kaiser may now seek to contend that both the district court and the Court of Appeals (which was unanimous on this issue) abused their discretion in commencing interest as of December 2, 1981

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26 *See United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971); *Smith v. National Railroad Passenger Corp.*, 856 F.2d 467 (2d Cir. 1988); *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987); *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706 (5th Cir. 1986); *Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988); *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943, 945 (7th Cir. 1984) (per curiam); *Buck v. Burton*, 768 F.2d 285, 287 (8th Cir. 1985); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983); *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737-38 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 28 (1988); *Georgia Association of Retarded Citizens v. McDaniel*, 855 F.2d 794, 799 (11th Cir. 1988); *cf. Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988) ("Interest on an attorney fee award . . . runs from the date of the judgment establishing the right to the award, not the date of the judgment establishing its quantum.").

rather than December 4, 1981, the court should deny Kaiser's Petition because:

(1) Kaiser failed to present argument on this issue in the Court below;

(2) the Court below had discretion in setting the date to commence interest;

(3) Plaintiffs counsel specifically requested the District Court to enter judgment on December 2, 1981 when the verdict was rendered, but the Court delayed entry for two days notwithstanding Fed. R. Civ. P. 58 which requires entry of judgment "forthwith";

(4) two days of interest is a de minimus issue which does not warrant the attention of this Court; and

(5) the only real significance of the distinction between December 2 and December 4 is in determining which Treasury bill rate applies—an issue which has been remanded to the district court for decision and is not ripe for consideration by this Court.

None of the arguments raised by Kaiser relating to the time period of interest, present any substantial issues warranting certiorari.

10. The Court Of Appeals' Opinion Represents A Compromise Of The Difficult Issues Presented To It And This Court Should Not Unravel That Compromise By Considering The Limited Issues Presented In Kaiser's Petition

Federal Rule of Appellate Procedure 37 grants the Cour of Appeals broad discretion in determining appropriate interest awards. Kaiser's certiorari petition seeks to take that discretion away from the Court of Appeals, and attempts to establish rigid rules that would achieve results contrary to the policy behind the federal interest statute, which is to preserve the value of the judgment against diminution due to loss of the time value of money.

Since August 1979, Kaiser has delayed full payment to Plaintiffs for liability under the antitrust laws. If Kai-

ser is to delay payment on the judgment, it must expect to pay adequate interest to preserve the value of the judgment against diminution due to the time value of money.

In light of the decision reached by the Court of Appeals, Plaintiffs cannot let Kaiser's petition for certiorari go unanswered. Plaintiffs present the issues upon which they were denied relief by the Court of Appeals in a separate Cross-Petition, which is asserted only in the unlikely event that this Court grants Kaiser's petition. The issues raised in Kaiser's petition (in particular the issue of manifest injustice under *Bradley*) cannot be considered in the absence of consideration of the denial of 2½ years interest and the denial of interest at market rates.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that Kaiser's petition for certiorari be denied. If the Court should grant Kaiser's petition, Plaintiffs respectfully request that the Court grant their Cross-Petition in order for the Court fully to consider the interrelated interest issues to do justice as between the parties.

Respectfully submitted,

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